No. 3871

In the

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

— VS —

ONE McLAUGHLIN TOURING AUTOMOBILE, SERIAL NUMBER 514874, ENGINE NUMBER 487067, BRITISH COLUMBIA LICENSE NUMBER 17893, RESPONDENT

ANGELO GULARAS, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDW. E. CUSHMAN, Judge

Brief of Appellee

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STATEMENT OF CASE

The FINDINGS OF FACT, CONCLUSIONS OF LAW and DECREE of the Honorable Nisi Prius Court set forth the facts with such exactness that we adopt them. they being *inter alia*, as follows:

"FINDINGS OF FACT

I

"The McLaughlin touring automobile above mentioned and referred to in this cause of action was on and prior to June 15, 1920, owned by one Alfred Swanson, and that on said June 15, 1920, said Swanson sold this automobile under conditional sale contract to Angelo Gularas, claimant herein, and that subsequently said Angelo Gularas made all of said deferred payments, and now is the owner of said automobile; thereafter and on July 17, 1920, said Angelo Gularas entered into a contract in writing with one Harry Sherman, whereby said Sherman agreed to run and operate or cause to be run and operated said automobile as a taxicab, and for that purpose only, in Vancouver, British Columbia, and that said Alfred Swanson, said Angelo Gularas, claimant herein, and said Harry Sherman, are each and all Canadian subjects and residents of Vancouver, British Columbia.

II

"That said Harry Sherman delivered said automobile to one Jim Roberts, alias Rogers, to drive as a taxicab in the city of Vancouver, B. C., and that said Roberts instead of continuing to so drive said automobile as a taxicab and for taxicab purposes only, placed or caused to be placed in said automobile on or about October 1, 1920, thirteen (13)

gunny sacks filled with bottles of Canadian whiskey, and said automobile with said whiskey was driven into the State of Washington from British Columbia on or about said October 1, 1920, and said Roberts did not report the arrival of said automobile into the United States, or make any entry of such arrival with the customs officials of said customs collection district, or with any customs officers whatsoever, nor did he pay any customs or duty upon said automobile, and on or about October 1st, 1920, was arrested by the sheriff of Whatcom County, Washington, and said automobile and whiskey seized by said sheriff, and that said automobile was thereafter and on November 6, 1920, by said sheriff, turned over to and seized by the customs officials in the customs collection district of Washington, and held by them on a claim that the same was not entered or declared when it came into the State of Washington, and the United States of America.

III

"That at the time said automobile was seized as aforesaid, it was being used to carry prohibited intoxicating liquor from British Columbia into the State of Washington, and for no other purpose, and said automobile was so driven into the State of Washington from British Columbia only as an instrument of conveyance for temporary purposes, and only in the prosecution of a temporary journey or visit, and with the purpose and intent of returning said automobile to Vancouver, British Co-

lumbia, all of which was done without the knowledge, acquiescence or consent in any manner of claimant, who is an innocent party, and in no way connected with either said automobile coming within the United States or its transportation of liquor, and that said claimant knew absolutely nothing about the same in any way, and honestly believed that said automobile was then and there being used in and about Vancouver, British Columbia, for taxicab purposes only, until he learned that it had been seized by the deputy collector of customs of the United States. . . . .

"CONCLUSIONS OF LAW

I

"That the automobile referred to herein is not subject to forfeiture under section 3082 Revised Statutes of the United States, or at all; that claimant, Angelo Gularas, is an innocent owner of said automobile, and not connected in any way with the bringing of said automobile into the United States, which said car was brought into the United States without the knowledge, acquiescence or consent of said claimant, Angelo Gularas, and that at the time said automobile crossed the International Boundary line from British Columbia, Canada, into the United States of America, and into the State of Washington, said Angelo Gularas, claimant herein, honestly believed that said automobile was being run and operated as a taxicab and for that purpose

only in the city of Vancouver, British Columbia, and that the said Angelo Gularas was innocent of any wrong or wrongdoing in the premises.

II

"That as said automobile was engaged in the importation of prohibited alcoholic liquor at the time of its seizure in the United States, it was not engaged in the importing of any merchandise, and was and is not subject to forfeiture under the customs law of the United States.

III

"That said automobile at the time of its entry into the United States of America, as well as at the time of its seizure as aforesaid, was not, merchandise, and that said automobile was wrongfully seized by the United States Government officials and that forfeiture of the same should not be had, and that said automobile should be delivered to claimant, Angelo Gularas, free of costs and charges.

. . . .

"ORDER AND DECREE

"IT IS ORDERED, ADJUDGED and DECREED that the information of libel for forfeiture herein be, and the same hereby is dismissed with prejudice, . . .

"Done in open court this January 24, 1922.

"EDWARD E. CUSHMAN,
"*Judge.*"

(Transcript of Record, 36 to 41, inc.)

The substance of the foregoing quotation being likewise set forth in the Bill of Exceptions. (Transcript of Record, 55 to 59, inc.)

□ □ □

ARGUMENT AND AUTHORITIES

Appellee maintains that this auto, under the peculiar circumstances surrounding this transaction, is not merchandise; appellee was and yet is its bona fide owner and verily believed this auto was being used as a taxi in Vancouver, British Columbia when seized.

This auto certainly was converted, and we assert technically stolen by Roberts—if Roberts had brought this auto into the United States without arrest, or had taken it from Vancouver to Calgary, or any other city or country he could have been, under the existing circumstances, arrested for theft; the theft was complete by Roberts when he placed the whiskey in this automobile and left the city of Vancouver.

"It was further admitted that . . . . Roberts received, concealed, and transported, and aided in the concealment and transportation of said auto-

mobile within the jurisdiction of said district court in Whatcom County, Washington. . . ." (Transcript of Record [Bill of Exceptions] page 56.)

True, Roberts was arrested by the sheriff of Whatcom County, upon his entry into the United States from Canada, as is more clearly shown by claimant's exhibit "C," a portion of which is as follows:

"Bellingham, Washington,
May 3, 1921.

"COLE & DOLBY,
Seattle, Washington.
Gentlemen:

"Replying to your letter of May 2, 1921, regarding certain matters connected with the arrest and seizure of John Doe Rogers, alias James Roberts, and a McLaughlin car, bearing British Columbia license No. 17893, engine No. 487067, report as follows, viz: Our records shows John Doe Rogers, alias J. M. Roberts, arrested October 1, 1920, sentenced October 14, 1920. Fined $500.00, costs $4.40, and thirty (30) days' jail sentence. Paid fine and costs and served time. Released October 30, 1920. Charged with illegal possession (two counts). Above mentioned car turned over to federal authorities, October 28, 1920. . . .

"A. L. CALLAHAN, *Sheriff.*
"By J. B. BENNETT, *Deputy.*"

The only objection made to the introduction of this evidence by the Government's counsel was ". . . it is purely a question of admissibility," (Statement of Facts, page 73), and we take it this objection was waived as it is not insisted upon in the Government's brief; hence the evidence also shows that this man Roberts was by the state authorities arrested, fined and jailed; the automobile in question was also seized by the state authorities on about October 1, 1920, and after being in possession of the sheriff of Whatcom County for twenty-eight (28) or thirty (30) days was turned over to the United States authorities.

It is admitted by the Government and claimant, that Roberts, in violation of his trust, put whiskey in this automobile, left Vancouver for the United States, came across the line and did not report or declare on this automobile nor the whiskey, and was subsequently arrested as hereinbefore stated; that this automobile came into this country ". . . on its own power," (Transcript of Record, page 63), and "that it was driven into said state for temporary purposes only, and with the purpose and intent of returning said automobile to Vancouver, British Columbia." (Transcript of Record, paragraph V, page 26.) (Claimant's answer.)

"MR. COLE: Yes, well the only thing we care to introduce outside of the admissions, so to speak, that if Mr. Gularas was here he would testify substantially to the matters set forth in our answer. . . ." (Statement of Facts, page 12.)

"MR. FRATER: . . . I do admit that Mr. Gularas would testify in accordance with the affirmative matter contained in his claim.

"THE COURT: You have no opposing evidence?

"MR. FRATER: No, I have no opposing evidence. . . ." (Statement of Facts, page 22.)

Thus it will be observed that the Government's learned counsel is honestly mistaken when he states in his brief, pages 4 and 5:

". . . there is not a scintilla of evidence given to show that it was in fact the purpose of the driver of the automobile to return the same to Canada, whence he came. The intent on the part of the driver to return this automobile to Canada was merely assumed by the court."

We repeat this automobile is not merchandise, and the case of *U. S. vs. One Sorrel Horse*, No. 15,953, 27 Fed. cases, 315, is so in point that it could truthfully be said "it is on all fours."

"This was an information against a horse seized as forfeited for having been imported or brought from Canada into the United States in

violation of the revenue laws thereof. . . . the horse was driven by the claimant, harnessed before another horse, . . . from Canada into the district of Vermont, not for sale or to be kept in the country for use, but in the prosecution of a journey to the State of Maine, on business of a temporary nature, with the intention of returning with the horses and sleigh to the claimant's place of residence in Canada, immediately after the accomplishment of his business. The question was, whether, upon the facts so found, there having been no report or entry made, manifest delivered, or duties paid, the horses was liable to seizure and forfeiture. . . .

"PRENTISS, District Judge: The forfeiture claimed . . . must be claimed under the provisions of the act of 1821 . . . The first section of the act of 1821 is broad enough to embrace, and undoubtedly does embrace, every mode whatever of importing or bringing into the United States, from adjacent foreign territory, merchandise subject to duty, either by land or by water. It provides, that every person, coming into the United States from an adjacent foreign country, with merchandise subject to duty, shall deliver at the office of the collector of customs a manifest of the merchandise; and, on neglect to do so, the merchandise, imported or brought in, shall be forfeited. Horses may not be usually included in the term 'merchandise,' but being objects of trade and commerce, they may be called merchandise, within the meaning and intention of the act, whenever they are imported or brought into the country as such. A horse brought

from an adjacent foreign territory into the United States for the purpose of sale, or of being kept there either for use or sale, horses being subject to duty, is within the sense and object of the act. But a horse brought in, not for any such purpose, but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not brought in as merchandise, and is therefore not within the purview of the act. To hold otherwise would be to adopt a construction, which would not only be particularly embarrassing and vexatious in its effects upon the ordinary intercourse between the residents on the opposite sides of the frontier line, but would be productive of much inconvenience in its more general operation. The case under consideration, then, on the facts found by the jury, being not within the meaning, intention, or policy of the act, the horse in question was not subject to seizure and forfeiture. It was said in argument, that this construction of the act would open the way to fraudulent evasions of the law, and expose the officers of the customs to peril in the execution of their duties. . . . There must be judgment therefore on the verdict for the claimant."

This decision is cited but once, and that is in 17 Wall. (84 U. S.) 93, 21 L. Ed. 613 on 617, on another point.

The provisions mentioned in the above quotation are substantially the same as in section 3082 which says:

"If any person shall fraudulently or knowingly import or bring into the United States . . . . any merchandise contrary to law, such merchandise shall be forfeited, and the offender shall be fined. . . . ."

Merchandise is also defined as follows:

"The term 'merchandise' is, I think, used in its mercantile sense only. Horses and trucks may, indeed, be merchandise. They are so, in a mercantile sense, when shipped or put aboard a vessel as merchandise; but when they are driven aboard in charge of their drivers, who are passengers, and remain in their charge upon the trip, they are not shipped, taken in, or put on board as 'merchandise.' . . . ." (The Garden City, 26 Fed. 766 on 770.)

On February 25, 1921, Honorable Edward E. Cushman had submitted to him a case where substantially the same facts were set forth as in the instant case, and on November 8, 1921, Honorable Jeremiah Neterer had submitted to him a case where substantially the same facts were set forth as in the instant case, wherein each of said judges held in favor of the respective claimants, and since we have not been able to find that either of these cases have been reported, we will set out the opinions of said judges in full, to-wit:

"IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

UNITED STATES OF AMERICA, *Libelant*, — VS — ONE HUDSON SIX-CYLINDER AUTOMOBILE, Serial No. 3563, British Columbia License No. 17265, *Respondent.*	No. 5700 MEMORANDUM DECISION Filed February 25, 1921

Hon. Robert C. Saunders, U. S. Attorney,
Hon. R. E. Capers, Assistant U. S. Attorney,
For Libelant

Bausman, Oldham, Bullitt & Eggerman,
For Claimant

CUSHMAN, District Judge:

"The strayed cattle case (*U. S. vs.* 85 *Head of Cattle*, 205 Fed. 679 at 681) is in point to this extent: Judge Bourguin points out in it the friction liable to arise in a foreign country—the bitter feeling liable to be excited by any harsh practice or interpretation in the enforcement of the customs law, and reprisals taken to the disadvantage of our own citizens—there concludes that comity between neighboring nations justifies liberality in interpreting the statutory rule.

"In the matter of customs duties on imported merchandise, we have largely to do with people from foreign countries who can not be expected to have the same familiarity with our laws as our own citizens have. Our citizens and residents of this country alone are concerned, generally, with those businesses which are regulated by the internal revenue laws. Hence there is justification for a more liberal and considerate practice or rule in the administration and interpretation of the customs law than in the internal revenue.

"The only province of the court is to determine what the law is. Congress in protecting the equities of bona fide and innocent vehicle owners under the Volstead Act, which act prohibited the transportation into the United States of intoxicating liquor, containing over one-half of one per cent alcohol by volume and fit for beverage purposes, as well as its transportation within the country, which necessarily follows that, if it be determined that this automobile was used for the purpose of bringing such liquor into the United States, that claimant herein is entitled to prevail, for the court finds it to have been innocent in all respects in this transaction.

"It cannot be that Congress ever contemplated that a person smuggling liquor into the United States would appear at the customs house and declare his automobile and offer it for examination and inspection to the customs officers. The same would be true regarding any and all other vehicles so used.

"The court in the present case places its decision on the authority of *U. S. vs.* 1,150½ *Pounds of Celluloid* (82 Fed. 627).

"The Government proceeds against the automobile in the present case as merchandise brought into the United States in violation of law, the forfeiture of which is condemned under section 3082 R. S. (Comp. Stat. 5785). In order for it to prevail, its forfeiture must then be shown to be as merchandise and not as a vehicle engaged in an illegal importation.

"There is this reason occurring to the court as shown why Congress may have intended a more drastic rule for the condemnation and forfeiture of the vehicle when used in the illegal importation of merchandise generally than would obtain in case of the bringing in of a vehicle as merchandise. The vehicle is not, ordinarily, a thing of any great value, whereas the value of the merchandise, which might be illegally brought into the United States, or transported within the United States might be exceedingly large and out of all proportion and relation to the actual value of the vehicle.

"As a vehicle engaged in such transportation, the automobile, itself, would be an instrument of wrong—it is a guilty thing and not the subject of a wrong, merchandise, it is an innocent thing, forfeited as a means of punishing the guilty individual. As a vehicle engaged in such transportation, it is, itself, considered guilty. It is guilt of the latter character. That is the basis of the decision in *J. W.*

Goldsmith, Jr.-Grant Co. vs. U. S. (Supreme Court Decision No. 214, decided January 17, 1921.)

"Decree for Claimant."

"IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

UNITED STATES OF AMERICA, *Libelant,* — VS — ONE STUDEBAKER AUTOMOBILE, Engine No. B. F. 13463, British Columbia License No. 23154; King County, Washington, License No. 4840, together with its accessories, furniture, apparel and equipment, *Respondent.*	No. 6005 Decision filed November 8, 1921

Thos. P. Revelle, U. S. Attorney, Attorney for U. S.

Kellogg & Thompson, Attorneys for Claimant, William D. Sowerby.

NETERER, District Judge:

"The claimant, William D. Sowerby, operates an auto delivery in Vancouver, B. C., and hires automobiles to persons who personally drive such cars. On the day in question F. C. Johnson hired from

the owner the car in issue to drive from Vancouver to New Westminster and return, both in British Columbia. Johnson diverted the car from the purposed trip, and drove to the United States and on entering violated the custom laws, and the car was seized and forfeiture is prayed.

"That the car was wrongfully imported in violation of section 3082 R. S. section 5785 C. S. is established. It is clear that the owner, so far as the record discloses, was innocent of any purpose of infraction of the customs law. When Johnson diverted the car to the United States, instead of confining it to the trip for which it was hired, his possession became wrongful. The possession at the time of entry being wrongful, and no misconduct or negligence on the part of the owner appearing, the act of Johnson cannot forfeit the car as against the true owner. Kainit, 37 Fed. 326. *Prisch vs. Ware*, 4 Cranch 347; Lady Essex, 39 Fed. 767. The cases cited by plaintiff are cases where the forfeited property was in the lawful custody of the person violating the law, but used for an unlawful purpose. This was the status in *U. S. vs. Chandler automobile*, decided by this court April 9, 1919.

"NETERER, *Judge.*"

The authorities cited by the Government's counsel as an abstract proposition of law, and when applied to apropos fact are germane to those facts; but they do not apply to nor fit the facts of the instant case—here is an automobile owned by a

Canadian, converted,—stolen—by a foreigner, an instrument of conveyance only, fraudulently driven from a foreign country with contraband goods, into the United States with the intention of returning to its home port when discharged of its cargo—goods, not even merchandise.

The last two cases cited in the brief of the Government's counsel are far afield when applied to the facts in this case; at the trial, the Government's counsel was somewhat of the same opinion as he states, statement of facts, page 15:

"Now I have found and located another citation, namely in the case of the *United States vs. One Black Horse, et al.*, in 147 Fed. 770, which holds that a horse and wagon used in the transportation of smuggled merchandise is forfeited. Of course that is a little different from this case."

True, the facts are quite different from the instant case, as well as are the facts in 129 Fed. 167. Neither of those cases were prosecuted under R. S. section 3082.

These two cases cited by the learned counsel for the Government are, in our opinion, overruled in re; *U. S. vs. One Paige Automobile, et al.*, 277 Fed. 524, that court holding in substance that the Government should proceed under section 26 of

title 2 of the Volstead Act (41 Stat. 315), the Government in that case taking the position that they had a right to insist upon a forfeiure under either law applicable, to-wit: section 26 of the Volstead Act or the customs law (38 Stat. 114).

Even though it be held that these two decisions are not overruled, and that section 3082 of the Revenue Law is the proper one to proceed under, the case of *U. S. vs. One Automobile,* 237 Fed. 891, holds to the contrary. We quote only a portion of the syllabus:

"An Indian was given possession of a motor car under a conditional contract of sale, used the machine for the purpose of introducing intoxicating liquor into Indian country, held that only his interest in the car could be forfeited."

A kindred decision is found in, and an affirmance of this principal is determined by the Circuit Court of Appeals, Eighth Circuit, *Shawnee National Bank vs. U. S.,* 249 Fed. 583. The syllabus in that case saying in part:

"It is a principal of natural law and justice that statutes will not be held to forfeit property except for the fault of the owner or his agents, unless such a construction is unavoidable."

The same principal is laid in *U. S. vs.* 1,150½ *Pounds of Celluloid,* 82 Fed. 627, Circuit Court of Appeals, Sixth Circuit, and was heard "Before Taft and Lurton, circuit judges . . ." Opinion written by Justice Lurton.

District Judge Bourguin in speaking of forfeitures says:

"Forfeitures are odious, and to be declared only when clearly imposed by statute. When they are claimed against those whose only offense is that they lawfully intrusted their property to others who betrayed the trust and diverted the property to unlawful uses, it must be very clear indeed that the owners are within both the latter and spirit of the statute, or the claim must be disallowed. The statute herein has no application to the property of Matt's parents. The whiskey of Grandjo and the horse of James Matt are alone declared forfeited. The parents of Matt will have judgment. The seizure of their property was with probable cause, however, and upon reasonable grounds; and a certificate thereof will be entered."

U. S. vs. Two Gallons of Whiskey, 213 Fed. 986 on 988.

Again we cannot subscribe to the doctrine that the Government has any right after the state has arrested the driver, fined and imprisoned him and held the automobile for twenty-eight days, to then

two days before the driver is released, deliver this automobile to the Government for seizure and forfeiture, and which was seized on November 6th, as set forth in paragraph V of the libel (Transcript of Record, page 4)—said libel being verified on November 29, 1920.

We maintain that the construction placed upon section 3082 by the Government is not warranted so long as another construction is possible, and that the judgment of the Honorable Nisi Prius Court should be affirmed.

Respectfully submitted,

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